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No. 84-1579

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PRESBYTERY OF ELIJAH PARISH LOVEJOY by its representatives, the commission members named below, and CORTLEY BURROUGHS, TRACY HUSTON, MANLEY MACE, WILLIAM T. HANCOCK, RICHARD D. SHEWMAKER and LORNA WAGNER, and PRESBYTERY OF ELIJAH PARISH LOVEJOY, INC., a Missouri pro forma decree corporation,

Petitioners,

vs.

PAUL JAEGGI, PAUL BARKER, HAROLD BOWERMAN, ROBERT CANFIELD, BEN CARTER, GEORGE DEVLIN, WILLIAM DICK, KARL DOLDE, JIM HYDAR, TERRY JONES, GEORGE LANZ, ROBERT PARKS, FRANK RALL, DAN SMITH, DAROLD STRAND, ARTHUR TAPY, and MEMORIAL PRESBYTERIAN CHURCH OF ST. LOUIS, a Missouri pro forma decree corporation,

Respondents.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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No reply, we believe, is needed to the obfuscatory parts of respondents' brief, such as the recitation (pp. 3-4) of the reasons

why the Supreme Court of Missouri found there was no trust[1], the pretense (footnote 2, p. 6) that instead of *relying,* as we are, on the opinion of the Court in *Jones v. Wolf* (1979) 443 U.S. 595, we are attempting to "distinguish" that case, and such things as the reference (p. 8) to "innumerable" cases in many states "which have applied 'neutral principles' in situations involving the Southern Presbyterian Church and to a variety of non-Presbyterian churches."

But there are two things which, we believe, should be mentioned.

First, the importance of the present petition is shown by the fact that, as stated on page 7 of respondents' brief, there are six very recent cases — five plus the case at bar — one decided in 1983, three (including our case) in 1984, and two in 1985, which decided against the UPCUSA and in favor of local congrega-

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[1] Respondents' counsel twice (p. 3 and p. 8) refer to the proposal in 1929 (which failed of adoption) of an amendment to require local churches to include provisions that their "property is held in trust under the Constitution of and for [the national church]." (App. A-9). This amendment would have been along the same lines as the provision of the Methodist Book of Discipline referred to in footnote 2 of the Court's opinion in *Jones v. Wolf* (443 U.S. at 600). It is different from the amendment adopted in 1981 in response to *Jones v. Wolf* (quoted App. A-10). The General Council which recommended the 1929 amendment made it clear in its report (Defendants' Ex. 35f p. A931) that it did not consider the amendment necessary, but that by its adoption the denomination's property interests would be "doubly safeguarded", and said, "The widespread litigation in connection with the Cumberland Reunion in 1906 has made it certain that when properly presented the rights of the Presbyterian Church in the U.S.A. in the property of the particular church are adequately protected in the civil courts of all of our states." *Hayes v. Manning* (1914) 263 Mo. 1, 172 S.W. 897, was of course a part of that "widespread litigation". But of course none of this discussion has anything to do with the constitutional question presented by our petition for certiorari.

tions that were attempting to withdraw[2]. Two of these are so recent they may come here by application for certiorari.

Second, respondents' brief does not even attempt to answer the proposition that the explicit provision (Section 41.15) in the UPCUSA's constitution authorizing the taking of temporary control of a local church by the denominational church of which it is a part, is entitled to enforcement as a matter of constitutional law, under the opinion of the Court in *Jones v. Wolf*. Instead of trying to answer this proposition, counsel argue, in substance, that after what they repeatedly (starting on page 3) call Memorial's "disaffiliation" — i.e. after Memorial's unilateral attempt to withdraw on July 21, 1980 — the provisions of the UPCUSA's constitution could have no further effect, so that the Presbytery's action after that time was nugatory.

This is of course a question-begging argument. If in *Jones v. Wolf* the Vineville church had been able by the simple act of "disaffiliation" to cut off all the rights of the denomination, there would have been no occasion to vacate and remand the Georgia court's decision. The dissent charged (and the opinion of the Court with equal vigor denies) that the decision was imposing a congregational form of government on a church in which the local churches are subordinate parts of a larger whole — a result which, we submit, the Supreme Court of Missouri has accomplished in the case at bar by refusing to enforce Sec-

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[2] The Supreme Court of Missouri (App. A-12) cites two cases "in the wake of *Jones*" that hold the other way. In one of them certiorari was denied on February 21, 1984, *Babcock Memorial Presbyterian Church v. Presbytery of Baltimore* (1983) 296 Md. 573, 464 A.2d 1008, cert. den. 104 S.Ct. 1287. In the other, *Fonken v. Community Church of Kamrar* (Ia. 1983) 339 N.W.2d 810, certiorari was not applied for. The Maryland case is based on "neutral principles" and the Iowa case is based both on *Watson v. Jones* (1872) 80 U.S. (13 Wall.) 679, 20 L.Ed. 666, and "neutral principles".

tion 41.15 because there was no "trust" expressed in the Book of Order. But under the respondents' present argument you would never get to the question which split this Court 5 to 4; a local Presbyterian church could simply "disaffiliate" and all denominational rights would be gone. The distinction between so-called "hierarchical" churches — those so constituted that the denominational or national church is one church of which local or particular churches are subordinate bodies — and congregational churches, would be obliterated.

This extreme position (which, though a desperate one, is, we believe, forced on counsel for respondents by the lack of anything better) has led counsel to make statements such as the one on page 4 that the Supreme Court of Missouri "found nothing [in the Book of Order] that prohibited member churches from leaving the denomination or giving the Presbytery power over disaffiliated churches." These are not things the Supreme Court of Missouri was looking for. On the contrary, what the Supreme Court of Missouri looked for is what counsel say the Supreme Court of Missouri "also stated", when counsel say (p. 4), "The Supreme Court of Missouri *also* stated * * * 'that the Book of Order as it existed on July 21, 1980, did not create an express or implied trust in favor of UPCUSA with respect to the property of Memorial.' " (emphasis added)[3]

There are, as pointed out above, a number of cases where various state courts have misconstrued *Jones v. Wolf* so as to hold, in effect, that explicit and legally cognizable provisions of the UPCUSA's constitution could be disregarded because of lack of a trust of the kind the Georgia courts were looking for in the *Jones* case. But even these cases have not held that the

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[3] The trial court, citing rulings of the General Assembly over 100 years old (1866 and 1867) found (App. A-25): "that under Presbyterian Church law a local congregation does not have the right to unilaterally withdraw without the assent of the Presbytery."

denominational constitution is an illusory contract, terminable at the will of any particular church at any time for any reason or for no reason.

Respectfully submitted,

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